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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 10-51; FCC 11-155]

Structure and Practices of the Video Relay Service Program

AGENCY: Federal Communications Commission.

ACTION: Final rule; clarification.

SUMMARY: In this document, the Commission addresses three petitions for clarification or reconsideration of a previous order, and amends and clarifies the Commission's rules regarding Internet-based Telecommunications Relay Services (iTRS) applicants for certification.

DATES: Effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, except for 47 CFR 64.606(a)(2)(ii)(A)(4) through (8) and (a)(2)(ii)(E) contains new or modified information collection requirements that require approval by the Office of Management and Budget (OMB). The Federal Communications Commission will publish a document in the Federal Register announcing the effective date.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Gregory Hlibok, Consumer and Governmental Affairs Bureau, Disability Rights Office at (202) 559-5158 (VP) or e-mail at Gregory.Hlibok@fcc.gov. For additional information concerning the information collection requirements contained in this document, contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Structure and Practices of the Video Relay Service Program, Memorandum and Opinion and Order (MO&O) and Order (Order), document FCC 11-155, adopted October 17, 2011, and released October 17, 2011 in CG Docket number 10-51.

The full text of document FCC 11-155 and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. Document FCC 11-155 and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, BCPI, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. via its web site www.bcpweb.com or by calling (202) 488-5300. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Document FCC 11-155 can also be downloaded in Word or Portable Document Format (PDF) at: <http://www.fcc.gov/cgb/dro/trs.html#orders>.

SYNOPSIS

In the MO&O in document FCC 11-155, the Commission addresses three petitions:

A. Sprint Nextel Corporation, Expedited Petition for Clarification, CG Docket No. 10-51 (filed September 6, 2011) (Sprint Petition).

1. Definition of Employees

Sprint requests that the Commission clarify that communications assistants (CAs) who are trained by the provider, who are stationed at the facilities of the provider and who are directly under the provider's supervision should be deemed to be employees of the provider, in satisfaction of the requirement that video relay service (VRS) providers employ their own CAs, regardless of whether or not they are hired directly by the provider. The Commission denies Sprint's requested clarification. The Commission has consistently distinguished "employees" from "subcontractors" and "contractors" in adopting rules and requirements governing the provision of VRS, and the Commission finds that Sprint's proposed

clarification would render those recognized distinctions meaningless. An entity seeking certification or already certified by the Commission must ensure that each of its VRS CAs who relays calls for which the entity will seek reimbursement from the Interstate TRS Fund (Fund) is a full or part-time employee of that entity. A CA cannot be an independent contractor or a temporary worker assigned by an agency, on a non-employment basis, to handle VRS calls. The Commission also clarifies that this restriction should not preclude a provider from hiring a CA to handle VRS calls on a temporary or part-time basis so long as the CA is an actual, demonstrable employee, not a contractor or other temporary, non-employed worker, of the provider.

2. Roll-Over VRS Traffic

Sprint further requests that the Commission clarify that certified VRS providers will be able to send traffic to other certified VRS providers “when they are unable to immediately handle that traffic due to factors outside of their control, e.g., a sudden surge in traffic due to an earthquake,” and still be able to bill and receive compensation from the Fund for such traffic under § 64.604(c)(5)(iii)(F)(1-4) of the Commission’s rules.

The Commission grants Sprint’s request for clarification that certified VRS providers may roll-over VRS traffic to another eligible provider when unable to handle an unexpected and temporary surge in call traffic, and finds this request generally to be consistent with the goals and policies of the Commission’s VRS rules. The Commission clarifies that a certified provider may seek reimbursement from the Fund for minutes of use that it routes to another certified VRS provider where exigent circumstances warrant such routing to handle an unexpected and temporary increase in the certified provider’s incoming traffic.

Exigent circumstances do not include events that result in increases in traffic that, in the ordinary course of business, could reasonably have been anticipated, such as a surge in traffic occurring during a holiday period.

The Commission also reiterates that § 64.604(c)(5)(iii)(N)(1)(iii) of its rules only allows an eligible provider to subcontract for CA services or call center functions with, or otherwise authorize the provision of such services or functions from, another eligible provider. The Commission therefore clarifies that this rule does not apply to non-certified applicants for certification; as such, non-certified applicants for certification may not rely on the ability to subcontract for or otherwise authorize the provision of CA services or call center functions on their behalf after they are certified, to demonstrate their eligibility for certification.

3. ACD Platform Leasing from Third-Party Non-Provider

Sprint's final request is that the Commission clarify that a VRS provider leasing an automatic call distribution (ACD) platform from a vendor not affiliated with any VRS provider need not locate such ACD on its premises or use its own employees to manage such platform. The Commission grants Sprint's request insofar as it confirms that a VRS provider leasing an ACD platform from a vendor not affiliated with any VRS provider need not locate such ACD on its premises or use its own employees to manage such a platform. However, regardless of the location of the ACD, each provider is responsible for the oversight of all the core operations associated with such ACD platform, and shall be held accountable for compliance with all pertinent Commission rules and policies.

B. Sorenson Communications, Inc., Petition for Reconsideration of Two Aspects of the Certification Order, CG Docket No. 10-51 (filed September 6, 2011) (Sorenson Petition).

In its petition for reconsideration, Sorenson maintains that the Commission did not adequately justify the burdensomeness of requirements that VRS providers submit, as part of their certification applications and, as applicable, in annual reports regarding their compliance with the TRS rules: (1) "proofs of purchase or license agreements for all equipment and/or technologies, including hardware and software, used for the

applicant's VRS call center functions"; and (2) all written sponsorship agreements relating to iTRS. The Commission grants Sorenson's petition to the extent discussed below.

The Commission modifies the documentation requirements for proofs of purchase, leases, or license agreements for technology and equipment used to support call center functions, to apply only to the technologies and equipment for a representative sampling of five of a provider's domestic call centers, where the provider has more than five such centers. However, the Commission requires applicants to retain proofs of purchase for all technology and equipment used to support call center functions for all of their call centers, and to furnish such documentation to the Commission upon the Commission's request. In addition, the Commission continues to require providers to submit documentation for all technology and equipment used to support call center functions for VRS providers that maintain five or fewer domestic call centers, and for all international call centers regardless of the provider's size. Furthermore, the Commission continues to require all VRS applicants, regardless of size, to describe in their submissions the technology and equipment used to support their call center functions -- including, but not limited to, ACD, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration. However, in response to Sorenson's stated concerns, the Commission modifies the requirement that the applicant state whether the technology and equipment for each call center function is owned or leased to pertain only to the maximum of five call centers for which, as described above, the applicant must provide proofs of purchase, license agreements, or leases. Finally, in light of the particular documentation requirements applicable to leased ACD platforms, the Commission will continue to require that VRS applicants provide a complete copy of all ACD leases or license agreements.

The Commission also clarifies that applicants need only to submit a list of all sponsorship arrangements, and to describe on that list any associated written agreements relating to iTRS -- applicants need not furnish the actual copies of the arrangements and associated agreements, but must retain copies of all such

arrangements and agreements for a period of three years from the date of the application and submit them to the Commission upon request.

C. AT&T Services, Inc., Petition for Reconsideration of AT&T, CG Docket No. 10-51 (filed September 6, 2011) (AT&T Petition).

In its petition for reconsideration, AT&T generally seeks reconsideration of the requirements that applicants for certification operate their own call centers and employ their own CAs. In addition, AT&T seeks reconsideration of the prohibition against VRS providers subcontracting these core VRS functions to another certified VRS provider. The Commission denies the AT&T Petition, and finds that there is ample evidence in the record that allowing VRS providers that operate without their own facilities to seek reimbursement from the Fund has contributed to the serious fraud that has plagued the VRS program.

D. Sua Sponte Order

In the Order, the Commission clarifies, on its own motion, its policies and rules regarding on-site visits to the premises of iTRS certification applicants and certified iTRS providers. The Commission clarifies that such visits to both applicants for certification and certified providers may be announced or unannounced. Applicants for certification and certified providers must comply with a request by an authorized representative of the Commission to conduct either announced or unannounced on-site visits. In the case of applicants, the failure to allow complete access to inspect areas of the premises and documents related to the provision of iTRS, and to observe live iTRS calls, at the time of an authorized on-site visit will be cause for application denial. In the case of certified providers subject to an on-site visit to ensure continued compliance with the Commission's rules and requirements, such failure will result in the suspension of payments from the Fund until such access to iTRS-related areas, documents and activities is allowed. In addition, a certified provider's failure to cooperate with an announced or unannounced on-site visit will be deemed a violation of the Commission's rules governing provider audits and thus, may

also lead to a Commission proceeding imposing appropriate sanctions, including the suspension or revocation of the provider's certification or forfeiture proceedings.

PAPERWORK REDUCTION ACT ANALYSIS OF 1995

This document contains new and modified information collection requirements. The Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107-198, the Commission previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” In this present document, the Commission has assessed the effects of the modified rules for certification by the Commission of eligibility for payments from the Fund and finds that the modified information collection requirements will not have a significant impact on small business concerns with fewer than 25 employees. The Commission received comments on the information collection requirements contained in the iTRS Certification Order, under OMB Control No. 3060-1150. See, Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51, Second Report and Order, published at 76 FR 47469, August 5, 2011 (iTRS Certification Order). See also, Paperwork Reduction Act Comments of Sorenson Communications, Inc. (filed September 6, 2011). By the MO&O, the Commission addresses OMB's and Sorenson's concerns by revising the language in the rules to require that providers that operate five or more domestic call centers only submit copies of proofs of purchase, leases or license agreements for technology and equipment used to support their call center functions for a representative sampling of five call centers, rather than requiring copies for all call centers. Further, the Commission clarifies that the rule requiring submission of a list of all sponsorship arrangements relating to iTRS only requires that a certification applicant describe on the list associated written agreements relating to iTRS, and does not require the applicant to provide copies of all written agreements. The Commission believes that these two rule modifications significantly alleviate the burdens associated with the subject information collections

requirements, and address the concerns Sorenson raised in its PRA comments filed with OMB. Both the Administrative Procedures Act and the Commission's rules require notice of substantive rules issued by the Commission, with limited exceptions, to be made not less than 30 days before such rules goes into effect, absent good cause shown and published with the rule. In this case, the Commission finds good cause to make these rule modifications effective upon publication in the Federal Register of notice of the approval of the modified rule by OMB under the PRA.

FINAL REGULATORY FLEXIBILITY CERTIFICATION

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." See 5 U.S.C. 605(b). The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

In the MO&O, in response to a VRS provider's petition, the Commission amends its rules to modify the documentation requirements for eligible iTRS providers for proofs of purchase, leases, or license agreements for technology and equipment used to support call center functions, to apply only to the technologies and equipment for a representative sampling of five of a provider's domestic call centers, where the provider has more than five such centers. In addition, the Commission amends its rules to clarify that applicants need only to submit a list of all sponsorship arrangements, and to describe on that list any associated written agreements relating to iTRS – applicants need not furnish the actual copies of

the arrangements and associated agreements. The Commission will revise § 64.606(a)(2)(ii)(E) of its rules accordingly.

These amendments result in a significant reduction in costs and other burdens on any iTRS provider, large or small, to comply with these rules. Thus, the discussion of whether there is a significant economic impact on a substantial number of small entities is moot.

Therefore, the Commission certifies that the requirements of the MO&O will not have a significant adverse economic impact on a substantial number of small entities, because there will be no adverse impact on any entities, large or small.

The Commission will send a copy of the MO&O, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration, and in a report to Congress pursuant to the Congressional Review Act.

CONGRESSIONAL REVIEW ACT

The Commission will send a copy of document FCC 11-155 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A).

ORDERING CLAUSES

Pursuant to the authority contained in sections 1, 4(i), (j) and (o), 225, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), (j) and (o), 225, and 303(r), and § 1.429 of the Commission's rules, 47 CFR 1.429, document FCC 11-155 IS ADOPTED.

Sprint's Expedited Petition for Clarification IS GRANTED IN PART and DENIED IN PART, to the extent provided in FCC 11-155.

Sorenson's Petition for Reconsideration IS GRANTED, to the extent provided in FCC 11-155.

AT&T's Petition for Reconsideration IS DENIED.

Part 64 of the Commission's rules IS AMENDED.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 11-155, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Individuals with disabilities, Reporting and recordkeeping requirements, Telecommunications.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 254 (k), 227; secs. 403 (b)(2)(B), (c), Pub. L. 104-104, 100 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 207, 228, 254 (k), 616, and 620, unless otherwise noted.

Subpart F – Telecommunications Relay Services and Related Customer Premises Equipment For Persons With Disabilities

2. The authority citation for subpart F is revised to read as follows:

Authority: 47 U.S.C. 151-154; 225, 255, 303(r), 616 and 620.

3. Section 64.606 is amended by revising paragraphs (a)(2)(ii)(A)(4) and (5), by adding paragraphs (a)(2)(ii)(A)(6) through (8), and by revising paragraph (a)(2)(ii)(E) to read as follows:

§ 64.606 Internet-based TRS provider and TRS program certification.

(a)***

(2)***

(ii)***

(A)***

(4) A description of the technology and equipment used to support their call center functions – including, but not limited to, automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration -- and for each core function of each call center for which the applicant must provide a copy of technology and equipment proofs of purchase, leases or

license agreements in accordance with paragraphs (a)(2)(ii)(A)(5) through (7) of this section, a statement whether such technology and equipment is owned, leased or licensed (and from whom if leased or licensed);

(5) Operating five or fewer call centers within the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions for each call center operated by the applicant within the United States;

(6) Operating more than five call centers within the United States, a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States; a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for all call centers operated by the applicant within the United States must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request;

(7) Operating call centers outside of the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions for each call center operated by the applicant outside of the United States; and

(8) A complete copy of each lease or license agreement for automatic call distribution.

(E) For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including on that list a description of any associated written agreements; copies of all such arrangements and agreements must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request;

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